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No. 88-1317 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHURCHILL'S SUPER MARKETS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in light of petitioner's pervasive coercion of its employees, the court of appeals properly enforced the bargaining order issued by the National Labor Relations Board despite the passage of seven years from the time of the employer's illegal conduct to the issuance of the bargaining order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unreported. The decision and order of the National Labor Relations Board (Pet. App. A72-A94) is reported at 285 N.L.R.B. No. 21. The decision of the administrative law judge (Pet. App. A5-A67) is unreported.

JURISDICTION

The judgment of the court was entered on November 21, 1988. The petition for a writ of certiorari was filed on February 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates four supermarkets and a produce warehouse in the Toledo, Ohio, area (Pet. App. A7). In January 1980, Locals 954 and 626 of the United Food

and Commercial Workers International Union began organizing the employees at those facilities (*id.* at A7). All five of the employees at the warehouse, who constituted a separate bargaining unit, signed authorization cards by February 4, and two of the warehouse employees distributed handbills at petitioner's Central Avenue store on February 19 (*id.* at A85). On learning of the handbilling, petitioner's supervisor in charge of the warehouse called a meeting of warehouse employees. He asked them what their problems were and told them they were "a family" that could solve any problems without intervention from a third party (*id.* at A37, A85). He also told the warehouse employees that he was "disappointed" by their support of the Union, and stated that if the Union came in he would close the warehouse and that the employees would be out of jobs and ineligible for unemployment compensation (*id.* at A85).

A second meeting of the warehouse employees was held a few days later, with petitioner's executive senior vice-president and director of operations in attendance. At that meeting, Charles Tucker complained about his part-time status and consequent ineligibility for health insurance and other benefits, and another employee complained about the lack of a regularly scheduled lunch hour. Shortly thereafter, a new work schedule was posted with a regularly scheduled lunch hour, and Tucker was classified as a full-time employee.

On March 10, the Union requested recognition based on its card majority. Petitioner declined to extend recognition, and insisted on an election. On March 26, Richard Doll, a known union activist who had participated in handbilling, was discharged. Pet. App. A7-A8, A48, A86. The Union filed charges of unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3), and (5), with re-

spect to the warehouse employees and with respect to the employees at three of petitioner's stores whom the Union sought to represent in separate bargaining units (Pet. App. A5 n.1, A6 n.3).[1]

2. In August 1981, an administrative law judge (ALJ) found that, by its threats, solicitation and satisfaction of grievances, and the discriminatory discharge of Doll, petitioner had committed serious violations of Section 8(a)(1) and (3) with respect to its warehouse employees, and had violated Section 8(a)(5) by its refusal to recognize and negotiate with the Union as their representative (Pet. App. A37, A38, A48, A58-A60). The ALJ further found that petitioner had engaged in additional unfair labor practices affecting employees system-wide, and in unfair labor practices affecting employees at individual stores (*id.* at A37-A56), including the discriminatory discharge of another union sympathizer (*id.* at A55-A56).

The ALJ recommended the issuance of a broad cease and desist order and reinstatement of the discharged employees with back pay (Pet. App. A62). With respect to the warehouse bargaining unit, the ALJ recommended that petitioner be directed to bargain with the Union as the representative of the warehouse employees, pursuant to *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), which authorized the issuance of bargaining orders "in cases where an employer's unfair labor practices are so serious that a fair and free election cannot be held" (Pet. App. A59).

3. The National Labor Relations Board (Board) issued its decision in July 1987. With respect to the warehouse employees, the Board adopted the ALJ's recommendation

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[1] Elections were scheduled in all four of the units, but were blocked pending disposition of the unfair labor practice charges (Pet. App. A6 n.3).

that it issue a bargaining order (Pet. App. A84-A87).[2] The Board emphasized "the seriousness of these violations" (*id.* at A86). It explained: "In the course of 5 weeks, the warehouse employees were threatened with plant closure, had their grievances solicited and remedied by top management, and saw one of their co[-]workers discharged for his union activity. These actions involve the type of pervasive coercion which has lingering effects not readily dispelled. Because of the swiftness and severity of [petitioner's] reaction against the Union's organizing drive, it is highly unlikely that a fair election could be conducted with the use of only traditional remedies." *Ibid.*

The Board further stated: "We are mindful that 7 years have passed since the occurrence of the unlawful conduct in the warehouse unit. The serious nature of [petitioner's] conduct in threatening plant closure, soliciting grievances, and discharging a union supporter, however, convinces us that the lasting effects of such conduct cannot be remedied either by the passage of time or the Board's traditional remedies. The passage of time, though regrettable, is not a sufficient basis for denying the bargaining order." Pet. App. A87, citing *Quality Aluminum Products,* 278 N.L.R.B. No. 49 (Jan. 31, 1986), enforced, 813 F.2d 795 (6th Cir. 1987).

4. In December 1987, petitioner filed a motion for reconsideration of the Board's order and reopening of the record "in light of the passage of time * * * and the substantial employee turnover * * * in the warehouse bargaining unit" (Pet. App. A100). A supporting affidavit stated

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[2] The Board disagreed with several of the ALJ's findings that petitioner had violated Sections 8(a)(1) and (3) by actions affecting store employees, and by the institution of a new health care program in March 1980 (Pet. App. A73-A84). It otherwise adopted his findings, conclusions, and recommended order (*id.* at A72-A73).

that, as of December 12, 1987, only one of the five current warehouse employees had been employed in 1980 (Pet. App. 103). The Board's Deputy Executive Secretary informed petitioner by letter[3] that, since the motion had been filed more than four months after the Board issued its decision, the motion was untimely under Section 102.48(d)(2) of the Board's rules, which requires such motions to be filed within four weeks. Accordingly, the letter stated that the motion would not be forwarded to the Board for consideration. In addition, the letter noted that the motion had been submitted after the Board had petitioned for enforcement and the record of the case had been filed in the court of appeals, thus depriving the Board of jurisdiction to modify or set aside its order. See 29 U.S.C. 160(d).

In April 1988, while the case was pending before the court of appeals, petitioner addressed another motion for reconsideration to the Board, stating that it no longer employed any of the warehouse employees it employed in 1980 (Pet. App. A105). In August 1988, after briefing had been completed, petitioner applied to the court of appeals for leave, pursuant to Section 10(e) of the Act, 29 U.S.C. 160(e), to adduce evidence before the Board that, as of March 1988, it no longer employed any of the employees affected by the 1980 unfair labor practices.[4] As the reason for its failure to adduce such evidence before the Board,

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[3] The letter is reproduced in the appendix to this brief.

[4] Section 10(e) provides, in pertinent part: "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record."

petitioner stated that the "passage of excessive time is continuing and the complete turnover of the employee compliment [*sic*] occurred only as of March, 1988" (Pet. App. A97).

5. The court of appeals took no action on petitioner's motion, but denied it, sub silentio, in its decision affirming the Board's order (Pet. App. A1-A2). The court concluded that the Board was correct in finding violations of Section 8(a)(1), (3), and (5) of the Act. It added that, "[e]ven though there had been a seven year delay on the part of the Board between the time of the violations and its decision, the Board was entitled to find that the taint of the serious illegal acts of the employer may still linger at the company's produce warehouse, the place where the union activity began. *See, e.g., NLRB* v. *Katz,* 369 U.S. 736, 748 n.16 (1962)." Pet. App. A2.

Judge Norris dissented. Citing *Clark's Gamble Corp.* v. *NLRB,* 422 F.2d 845 (6th Cir.), cert. denied, 400 U.S. 868 (1970), and noting that "the negative effects of outrageous conduct" might dissipate as the result of the passage of time, he asserted that the Board had abused its discretion when it concluded that a bargaining order was required "without having conducted any factual inquiry as to whether conditions" still warranted that remedy (Pet. App. A2).

Petitioner's motion for rehearing was denied, with no judge requesting a vote on petitioner's suggestion of rehearing en banc (Pet. App. A95).

ARGUMENT

The decision of the court of appeals involves the application of settled principles to the facts of this case, and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), this Court held that the Board may issue bargaining orders even where the unfair labor practices were not "outrageous" and "pervasive," where the unlawful conduct "nonetheless * * * ha[d] the tendency to undermine majority strength and impede the election processes" (*id.* at 613-614). In that situation, a bargaining order may issue "where there is * * * a showing that at one point the union had a majority" and "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order" (*id.* at 614-615).

The Board found that the Union had a clear card majority (Pet. App. A84) and that petitioner's unfair labor practices, which it termed "hallmark" violations (*id.* at A87), "involve[d] the type of pervasive coercion which has lingering effects not readily dispelled" (*id.* at A86). The Board concluded, and the court agreed, that in light of "[t]he serious nature of [petitioner's] conduct in threatening plant closure, soliciting grievances, and discharging a union supporter, * * * the lasting effects of such conduct cannot be remedied either by the passage of time or the Board's traditional remedies," and that the "passage of time, though regrettable, is not a sufficient basis for denying the bargaining order" (*id.* at A87). Accordingly, the decision below is fully consistent with *Gissel*.

2. Nor is review warranted on account of a conflict in the circuits. *NLRB* v. *Koenig Iron Works, Inc.*, 856 F.2d 1 (2d Cir. 1988) (Pet. 7-9), involved circumstances much different from those at issue here. The employers in that case had voluntarily recognized a Shopmen's local and entered into collective bargaining agreements with it, the last of

which expired in 1975. The employers then recognized a Teamsters local, but the Board ordered them to bargain with the Shopmen's local. The employers did so from 1982 to 1984, but, during the bargaining, granted unilateral wage increases that were held to be unfair labor practices. Bargaining resumed, but terminated in 1985. The court held that the employers there, which "had a considerable basis for doubting the current majority status" of the union (856 F.2d at 3), could force an election. Unlike the present case, the question whether serious misconduct would prevent a fair election was not at issue in *Koenig*. The issue there was whether the passage of time contributed to a legitimate doubt of continuing majority status of a previously recognized union.

The facts in *Impact Industries, Inc.* v. *NLRB*, 847 F.2d 379 (7th Cir. 1988) (Pet. 9-10), are also significantly different from those presented here. The Board there failed to consider evidence, timely proffered by the employer, that there had been an 87% turnover in its workforce since the time of its unfair labor practices and that its co-owners at that time had subsequently died (847 F.2d at 383). The court of appeals remanded for the Board to consider that evidence. Here, in contrast, there has been no change in ownership. That is plainly a critical factor in determining whether prior serious unfair labor actions would taint an election, since employees would not necessarily believe that a new owner would take the sort of actions taken or threatened by a prior owner. In addition, petitioner, unlike Impact Industries, did not make its proffer in timely fashion. Finally, petitioner has alleged only that there was a substantial turnover in the warehouse workforce *after* the Board issued its bargaining order. It has not alleged that there had been substantial turnover at the time the order was issued.[5]

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[5] Cf. *NLRB* v. *Marion Rohr Corp.*, 714 F.2d 228, 231 (2d Cir. 1983) (Pet. 8 n.5) (need for bargaining order must be assessed as of

CONCLUSION

The petition for writ of certiorari should be denied.
Respectfully submitted.

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APRIL 1989

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the time it is issued); *NLRB* v. *Pace Oldsmobile, Inc.*, 739 F.2d 108, 110 (2d Cir. 1984) (Pet. 8 n.5) (same). The Sixth Circuit in *Clark's Gamble Corp.* v. *NLRB*, 422 F.2d 845, cert. denied, 400 U.S. 868 (1970), relied on by the dissenting judge here (Pet. App. A2), did not suggest that the Board must consider turnover at the time of its decision in the absence of a timely allegation that such turnover has occurred. And the Sixth Circuit subsequently has held that "[t]he Board need not consider events occurring after the issuance of a bargaining order. To do so would put a premium upon continued litigation by an employer." *Automated Business Systems* v. *NLRB*, 497 F.2d 262 (1974) (citations omitted).

APPENDIX

[SEAL] NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

December 21, 1987

Re: Churchill's Supermarket, Inc.
Case No. 8-CA-13944-1 et al.

Terrance L. Ryan, Esq.
Marshall & Melhorn
Four SeaGate
Eighth Floor
Toledo, Ohio 43604

Dear Mr. Ryan:

We are in receipt of your moiton [*sic*] for reconsideration on behalf of the Respondent in the above captioned case.

Consistent with the provisions of Section 102.48(d)(2) of the Board's Rules and Regulations, the due date for receipt of your Motion for Reconsideration in this case was 28 August 1987. As your document was dated 14 December 1987, it was untimely submitted and thus will not be forwarded to the Board for consideration. In addition, under Section 10(d) of the Act, the Board may not modify or set aside its order ". . . after a record in a case shall have been filed in a court . . ." Because a petition for enforcement has been filed and the record has been filed with the court, the Board lacks jurisdiction to modify or set aside its order.

In accord with the above, all copies of your motion for reconsideration are returned herewith, with the exception of one copy, which will be retained for the Board's informal case file.

Sincerely,

/s/ JOSEPH E. MOORE

Joseph E. Moore
Deputy Executive Secretary

cc: NLRB-Region 8
Merritt W. Green, III, Esq.

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